Supreme Court of the United States

OCTOBER TERM, 1968

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No. #7

GEORGE SAMUELS, ABRAHAM C. TAYLOR, HERMAN BENJAMIN FERGUSON, ARTHUR HARRIS, MANDOLA McPHERSON, MAX STANFORD, MERLE STEWART, HAMPTON WOODWARD ROOKARD, URSULA VIRGINIA WEST and MILTON ELLIS,

Plaintiffs-Appellants,

against

THOMAS J. MACKELL District Attorney of Queens County, and LOUIS J. LEFKOWITZ, Attorney General of the State of New York,

Defendants-Appellees.

No. 29

FRED FERNANDEZ,

Plaintiff-Appellant,

against

THOMAS J. MACKELL District Attorney of Queens County, and LOUIS J. LEFKOWITZ, Attorney General of the State of New York,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR APPELLEE ATTORNEY GENERAL OF THE STATE OF NEW YORK

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Supreme Court of the United States

OCTOBER TERM, 1968

No. 580

GEORGE SAMUELS, ABRAHAM C. TAYLOR, HERMAN BENJAMIN FERGUSON, ARTHUR HARRIS, MANDOLA McPHERSON, MAX STANFORD, MERLE STEWART, HAMPTON WOODWARD ROOKARD, URSULA VIRGINIA WEST and MILTON ELLIS,

Plaintiffs-Appellants,

against

THOMAS J. MACKELL District Attorney of Queens County, and LOUIS J. LEFKOWITZ, Attorney General of the State of New York,

Defendants-Appellees.

No. 813

FRED FERNANDEZ,

Plaintiff-Appellant,

against

THOMAS J. MACKELL District Attorney of Queens County, and LOUIS J. LEFKOWITZ, Attorney General of the State of New York,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR APPELLEE ATTORNEY GENERAL OF THE STATE OF NEW YORK

POINT I

Since exercise of federal jurisdiction would unwarrantedly interrupt pending state court criminal proceedings, the injunctive and declaratory relief requested by appellants was properly denied.

Where pending state proceedings provide full opportunity to test constitutional claims, well-established principles of federalism require that such claims be adjudicated in the state courts, subject to review by this Court. As was said in *Dombrowski* v. *Pfister,* 380 U. S. 479, 484 (1965):

> "It is generally to be assumed that state courts and prosecutors will observe constitutional limitations as expounded by this Court and that the mere possibility of erroneous initial application of constitutional standards will usually not amount to irreparable injury necessary to justify a disruption of orderly state proceedings."

This Court's recent decision in *Zwickler* v. *Koota,* 389 U. S. 241, 253 (1968), noted with respect to non-intervention that it "recognized the continuing validity of that pronouncement."

As pointed out by a three-judge federal court in *Richardson* v. *Dudley,* —— F. Supp. —— (S.D.N.Y. 1969) [68 Civ. 4616, dec. January 17, 1969]:

> "It is settled that such exceedingly rare intrusions upon the state criminal process are permissible only 'in those exceptional cases' where the intervention is required 'to prevent irreparable injury which is clear and imminent'—or, more precisely, where such 'danger of irreparable injury' is 'both great and immediate.' *Douglas* v. *City of Jeannette,* 319 U. S. 157, 163, 164 (1943), and cases cited. That basic

principle has been steadily reaffirmed down to the present moment. *Stefanelli* v. *Minard*, 342 U. S. 117 (1951); *Dombrowski* v. *Pfister*, 380 U. S. 479, 485 (1965); *Zwickler* v. *Koota*, 389 U. S. 241, 253 (1967); *Cameron* v. *Johnson*, 390 U. S. 611 (1968); *Pugach* v. *Dollinger*, 277 F. 2d 739 (2d Cir. 1960), aff'd 365 U. S. 458 (1961); *Zwicker* v. *Boll*, 270 F. Supp. 131 (W. D. Wis. 1967), aff'd 391 U. S. 353 (1968)."

Appellants herein have been indicted under former Sections 160 and 161 of the New York Penal Law for advocating the overthrow of the government of New York State and its subdivisions by force and violence—that is, the use of firearms and bombs to sabotage public transportation and communication facilities and to assassinate state officers. The indictment specifies that appellants intended that the acts be presently attempted and accomplished. Nothing in appellants' briefs has demonstrated that the pending prosecutions based upon this indictment threaten them with immediate and irreparable injury.

Appellants Samuels, et al. (br. p. 17), suggest that adjudication by the state courts would result in "useless delay and expense . . .". However, they furnish no support for this assertion, nor do they show how this prosecution differs in respect to time or expense from those in which the federal courts have consistently refused to intervene. *Stefanelli* v. *Minard*, 342 U. S. 117 (1951).

Moreover, appellants Samuels, et al. (br. p. 14), admit that if the facts alleged in the indictment are true, "Such a group might conceivably cause disorder; they might even shoot someone, but these are crimes readily punishable by other statutes." If the conduct at issue constituted both means and intent to commit concededly illegal acts, how can appellants be wrongfully and irreparably injured by prosecution for such conduct?

Appellant Fernandez in turn contends (p. 41) that there is irreparable injury within the meaning of *Dombrowski*

v. *Pfister, supra,* because his prosecution (1) is based upon statutes which are overbroad and vague and (2) is "brought in bad faith, for the purpose of discouraging and intimidating the appellant and others in the exercise of First Amendment rights." Any attempt to analogize the facts herein with the facts in *Dombrowski* must fall. The prosecutions in the latter case were never brought, and the threat of bringing them effectively immobilized the plaintiff in the exercise of constitutionally protected activities. Here, the prosecutions are pending and are based upon intent to commit murder, arson and sabotage as part of an attack upon the State of New York. No "bad faith" is necessary to press a prosecution for such acts as these. Nor can it be shown that the state courts will fail to apply constitutional standards in any subsequent judgments. *Cf. City of Greenwood* v. *Peacock*, 384 U. S. 808, 827 (1966).

As to the assertion of vagueness and overbreadth, alleged constitutional defects could not alone support federal intervention in a pending criminal proceeding even if such defects existed. (Appellees will show that they do not in Point III, *infra.*) *Douglas* v. *Jeannette*, 319 U. S. 157, 163 (1943). However, appellant Fernandez (br., pp. 42-43) seeks to invoke the doctrine laid down in *Zwickler* v. *Koota, supra*, that a plaintiff cannot be forced to "suffer the delay of state court proceedings [which] might itself effect the impermissible chilling of the very constitutional right he seeks to protect . . ." (389 U. S. at 252). This analogy, too, is clearly erroneous in the light of the facts.

The statute at issue, as interpreted by the New York Court of Appeals in *People* v. *Epton*, 19 N. Y. 2d 496, 227 N. E. 2d 829 (1967), cert. denied app. dism. 390 U. S. 29, reh. den. 390 U. S. 976, requires that punishable conduct must not only seek the overthrow of the State or local government by violence, but must be accompanied by intent to accomplish this design and a resultant clear and present danger. This authoritative interpretation by New York's

highest court places pure speech and mere advocacy outside the ambit of the statute. Thus, the statute can have no "chilling effect" on the mere expression or advocation of unpopular views. However, acceptance of appellant Fernandez' rationale that the instant prosecution has such an effect because his conduct is alleged to include the act of advocacy would initially insulate any crime from State prosecution if any element of speech were connected with it. The lack of logic in such a rationale is patent.

Appellant's confusion is illustrated in his reference (br. p. 42) to a "suitor's choice of a federal forum for the hearing and decision of his federal constitutional claims" (*Zwickler* v. *Koota, supra,* 389 U. S. at 248). Appellant herein, unlike Zwickler, is a *defendant* in a state forum seeking to enjoin that forum from considering his claims. In *Zwickler,* appellant had been convicted of violating a statute prohibiting distribution of anonymous handbills in connection with an election of a public officer. The conviction was reversed on state law grounds by the New York Supreme Court, Appellate Term, and the New York Court of Appeals affirmed without opinion, 16 N. Y. 2d 1069 (1965). Thereafter Zwickler filed a United States District Court action, seeking declaratory and injunctive relief on the grounds that the statute was repugnant to the First Amendment. His state court prosecution was no longer pending, but constitutional questions had not been settled therein.

By contrast, the instant case involves several existing state court prosecutions which would be needlessly interrupted were this Court to take jurisdiction. Such intervention was expressly disapproved, as previously indicated, in *Zwickler* and in *Dombrowski.*

Further, it does not appear here that the appellant has "been threatened with any injury other than that incidental to every criminal proceeding brought lawfully and in good faith or that a federal court of equity by

withdrawing the determination of guilt from the state courts could rightly afford . . . [appellant] any protection which . . . [he] could not secure by prompt trial and appeal . . .". *Dombrowski* v. *Pfister, supra,* 380 U. S. at 485 (1965); *Douglas* v. *City of Jeannette, supra; Stefanelli* v. *Minard, supra.*

As to appellant's additional request for a declaratory judgment (br. p. 43), such discretionary relief should also be denied. As summarized in *Richardson* v. *Dudley, supra:*

> "[T]he reasons precluding an injunction 'inexorably require denial of * * * declaratory relief as well.' *Zwicker* v. *Boll,* 270 F. Supp. 131, 136 (W. D. Wis. 1967), aff'd 391 U. S. 353 (1968). But we note anyhow the familiar learning that a 'declaratory judgment, like other forms of equitable relief, should be granted only as a matter of judicial discretion, exercised in the public interest.' *Eccles* v. *Peoples Bank,* 333 U. S. 426, 431 (1948), quoted in *Public Affairs Press* v. *Rickover,* 369 U. S. 111, 112 (1962). It is grounds for the denial of such relief that 'the same issue is pending in litigation elsewhere.' *Abbott Laboratories* v. *Gardner,* 387 U. S. 136, 155 (1967); *cf. Public Service Commission* v. *Wycoff Co.,* 344 U. S. 237, 248 (1953). That general principle is *a fortiori* and compelling here; once it is held, as we hold, that there is no justification to enjoin the pending state criminal proceeding, the prayer for declaratory relief becomes either an academic exericse, *cf. Lebowich* v. *O'Connor,* 309 F. 2d 111 (2d Cir. 1962); *Williams* v. *Ball,* 294 F. 2d 94 (2d Cir. 1961), or in effect a fruitless restatement of the prayer for an injunction."

See also *Fenster* v. *Leary,* 264 F. Supp. 153 (S.D.N.Y. 1966), aff'd 386 U. S. 10 (1967).

POINT II

New York has a legitimate interest in protecting itself from violent overthrow and its anarchy statutes are not superseded by the existence of federal anti-sedition legislation.

It cannot be doubted that a State has a legitimate interest in protecting itself from violent attack within its borders directed at its branches and its political subdivisions. The decisions of this Court make it apparent that Congress did not pre-empt the states from enacting legislation to safeguard their internal security.

In *Pennsylvania* v. *Nelson*, 350 U. S. 497 (1956), a case strongly relied on by appellants, an acknowledged member of the Communist Party was convicted under a Pennsylvania statute for sedition against the government of the United States. This Court reversed the conviction because Congress had pre-empted the field of national security by the passage of the Smith Act of 1940, the Internal Security Act of 1950, and the Communist Control Act of 1954. However, the majority opinion of Chief Justice Warren made it clear that the States retained the power to protect themselves:

> "It should be noted at the outset that the decision in this case does not affect the right of States to enforce their sedition laws at times when the Federal Government has not occupied the field and is not protecting the entire country from seditious conduct . . . Neither does it limit the right of the State to protect itself at any time against sabotage or attempted violence of all kinds. Nor does it prevent the State from prosecuting where the same act constitutes both a federal offense and a state offense under the police power, as was done in *Fox* v. *Ohio*, 5 How. 410, and *Gilbert* v. *Minnesota*, 254 U. S. 325 . . ." (350 U. S. at 500).

This position was reaffirmed three years later in *Uphaus* v. *Wyman*, 360 U. S. 72 (1959). In answer to appellant's contention that the Smith Act had superseded the New Hampshire Subversive Activities Act of 1951, this Court said:

> "In *Nelson* itself we said that 'the precise holding of the court . . . is that the Smith Act . . . which prohibits the knowing advocacy of the overthrow of the Government of the United States by force and violence, supersedes the enforceability of the Pennsylvania Sedition Act which proscribed the *same conduct.*' (Italics supplied). 350 U. S., at 499. The basis of *Nelson* thus rejects the notion that it stripped the states of the right to protect themselves . . . The opinion made clear that a state could proceed with prosecutions for sedition against the state itself . . . Nor did our opinion in *Nelson* hold that the Smith Act had proscribed state activity in protection of itself either from actual or threatened 'sabotage or attempted violence of all kinds.' In footnote 8 of the opinion it is pointed out that the state had full power to deal with internal civil disturbances. " (360 U. S. at 76-77).

See also *DeGregory* v. *New Hampshire Atty. Gen.*, 383 U. S. 825, 827 n. 2 (1966); *State* v. *Cade*, 244 La. 534, 153 So. 2d 382 (1963), *appeal dism., cert. den.* 375 U. S. 44 (1963).

Analysis demonstrates that federal anti-sedition legislation is directed toward conspiratorial organizations that are national and international in scope. The Smith Act of 1940 was passed after World War II had begun, and during the time that Nazi Germany and Soviet Russia were aligned under a pact of non-aggression. The danger which Congress sought to prevent was the subversion of national and local governments by organizations that were supported and directed by sources outside of the United States. Manifestly this was the concern of Congress in passing the In-

ternal Security Act of 1950 and the Communist Control Act of 1954. As this Court noted in *Nelson:*

> "Congress has devised an all-embracing program for resistance to the various forms of totalitarian aggression. Our external defenses have been strengthened, and a plan to protect against internal subversion has been made by it . . . It has charged the Federal Bureau of Investigation and the Central Intelligence Agency with responsibility for intelligence concerning Communist seditious activities against our Government, and has denominated such activities as part of a world conspiracy. It accordingly proscribed sedition against all governments in the nation—national, state and local . . . Congress having thus treated seditious conduct as a matter of vital national concern, it is in no sense a local enforcement problem. As was said in the court below:
>
> 'Sedition against the United States is not a *local* offense. It is a crime against the *Nation.* As such, it should be prosecuted and punished in the Federal courts . . . It is not only important but vital that such prosecutions should be exclusively within the control of the Federal Government . . .' " (350 U. S. at 504-505)

In recent times the greatest threat to the security of the state has been posed by militant extremist groups who operate within a local area and who are not supported by foreign sources. These groups base their activities upon use of armed violence and purposeful destruction in order to achieve political and economic goals. Frequently their target is a branch or service of local government such as the police department, the welfare department, the fire department or a transportation facility. Local government is effectively immobilized by the creation of massive disorder and by the breakdown of essential services. Such

activities create clear and present danger as defined by this Court in *Yates* v. *United States,* 354 U. S. 298, 321 (1957) and *Dennis* v. *United States, supra,* 341 U. S. at 509-511.

The New York statute is a protection against modern forms of criminal anarchy. The indictment in the instant case charges appellants with advocating the overthrow of local government and its agencies by means of force. Unlike *Nelson* there is no attempt here to regulate conduct affecting national security.

POINT III

In view of the nature of appellants' activities they were adequately warned by the statute that their conduct was illegal.

Appellants argue that the New York statute at issue is overly broad in its wording, and that this alleged defect is not cured by the limiting construction given to the statute by the New York Court of Appeals in *People* v. *Epton, supra.* Appellants further claim that they "had every reason to believe that the statute was a dead letter" (br. of appellant Samuels et al., p. 19) in the light of the decision of this Court in *Dennis* v. *United States,* 341 U. S. 494 (1951). These arguments ignore the crucial fact that since the later interpretation in *Epton* narrowed the statute rather than broadening it, ample notice was provided at the time the acts charged in the indictment were committed.

In *Dennis* v. *United States,* this Court limited itself to two questions: (1) whether either § 2 or § 3 of the Smith Act, inherently or as construed and applied in that case, violated the First Amendment and other provisions of the Bill of Rights; (2) whether either § 2 or § 3 of the Act inherently or as construed and applied in that case

violated the First and Fifth Amendments because of indefiniteness (341 U. S. at 495-96).

On the first question, this Court acknowledged that the Holmes-Brandeis rationale of the earlier freedom of speech cases had been adopted in later cases: "Where an offense is specified by a statute in nonspeech or nonpress terms, a conviction relying upon speech or press as evidence of violation may be sustained only when the speech or publication created a 'clear and present danger' of attempting or accomplishing the prohibited crime . . ." (341 U. S. at 505). This Court noted that the "doctrine that there must be a clear and present danger of a substantive evil that Congress has a right to prevent is a judicial rule to be applied as a matter of law by the courts" (*Id.* at 513), and agreed with the findings of the trial court that the requisite danger existed to apply the Smith Act to defendants, notwithstanding the provisions of the First Amendment.

On the second question—indefiniteness—this Court held that it made "no difference, from the standpoint of vagueness, whether the standard of 'clear and present danger' is one contained in *haec verba* within the statute, or whether it is the judicial measure of constitutional applicability." (*Id.* at 515). This Court also noted that defendants' vagueness arguments were "particularly nonpersuasive" because the jury found that they had "intended to overthrow the government as speedily as circumstances would permit." (*Ibid.*).

Thus, the import of the *Dennis* case is that the New York statute would be preserved by a proper judicial application of the clear and present danger standard to the facts of a particular case, not that the statute was invalid or a "dead letter". The decision by the New York Court of Appeals in *People* v. *Epton, supra,* applied the *Dennis*

standard to the criminal anarchy statute as follows:

> "It is clear that the proscription of mere advocacy of the violent overthrow of the Government would be an unconstitutional infringement upon free speech (*Dennis* v. *United States, supra*). The advocacy of the overthrow of the Government by force and violence must be accompanied by an intent to accomplish the overthrow (*Dennis* v. *United States, supra; Keyishian* v. *Board of Regents*, 385 U. S. 589) and there must be a 'clear and present danger' that the advocated overthrow may be attempted or accomplished (*Dennis* v. *United States, supra*)." (19 N. Y. 2d at 506).

The defendant in *Epton* (as well as the appellants herein) had no greater knowledge of the intricacies of the clear and present danger test than the defendants in *Dennis*. Nevertheless, he was not immune from prosecution under the anarchy statute. What is important is that the New York Court of Appeals made a judicial determination that there was a clear and present danger of the evil that the legislature sought to prevent. (19 N. Y. 2d at 506).

Additionally, the "hard-core" activities with which appellants herein are charged make their vagueness arguments as unpersuasive as the arguments of the defendants in *Dennis*, who were found to intend the overthrow of the government as speedily as circumstances would permit. Appellants are charged with a forty-eight count indictment which includes forty-one counts for unlawful possession of rifles, pistols, shotguns and zip guns (Samuels App. pps. 20a-31a), one count for conspiracy to burn and set fire to certain public transportation facilities (Samuels App. pps. 17a-18a), and the charge of conspiring to assassinate public officers (Samuels App. p. 13a). It is an exercise in irony to analogize such activities to "vehement, caustic and sometimes unpleasantly sharp attacks on government and public officials" (*New York Times* v. *Sullivan*, 376 U. S.

254, 270), as appellants Samuels et al. seek to do (br. p. 14).

The advocacy of anarchy which the state is here attempting to prevent, cannot be isolated from the totality of facts and circumstances surrounding the alleged criminal behavior of appellants. Appellants were not scholars engaged in teaching or political debate (compare, e.g., *Keyishian* v. *Board of Regents*, 385 U. S. 589 [1967]). They were self-styled revolutionaries who allegedly were making active preparations to bring about the result which the State of New York has the power to prohibit, i.e. the overthrow of local government. In this context the advocacy of criminal anarchy takes on more than academic significance. The vagueness doctrine was designed to protect persons who were engaged in the discussion of radical ideas, not persons who were preparing to carry out those ideas by violent and unlawful means.

As noted by the decision below, appellants cannot complain that their "hard core activities" were not clearly proscribed by the provisions of the Penal Law. Appellants Samuels, et al. (br. p. 13) argue that "a riot and the overthrow of organized government are vastly different things." However, where the activities charged involve assassination of public officers and sabotage of public facilities, the resultant breakdown in state operations effectively threatens the overthrow of the state government contemplated by the statute.

CONCLUSION

For the foregoing reasons, the decision below should be affirmed.

Dated: New York, New York, March 11, 1969.

Respectfully submitted,

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